



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2017-0197]

**Hours of Service of Drivers: National Asphalt Pavement Association, Inc.;
Application for Exemptions**

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; grant of application for exemptions.

SUMMARY: FMCSA announces its decision to grant the National Asphalt Pavement Association, (Inc.) (NAPA) request for exemptions from two requirements of the hours-of-service (HOS) regulations for all drivers of certain commercial motor vehicles (CMVs): (1) the 30-minute rest break provision and (2) the requirement that short-haul drivers utilizing the record of duty status (RODS) exception return to their work-reporting location within 12 hours of coming on duty. The first exemption will enable drivers engaged in the transportation of asphalt and related materials to use 30 minutes or more of on-duty “waiting time” to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break. The second exemption will allow these drivers to use the short-haul exception but return to their work-reporting location within 14 hours instead of the usual 12 hours.

DATES: This exemption is applicable **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]** and expires **[INSERT DATE 5 YEARS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 614-942-6477. E-mail: MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to www.regulations.gov and insert the docket number, FMCSA-2017-0197, in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemptions

NAPA seeks two exemptions for all drivers transporting asphalt and related materials and equipment from the HOS 30-minute rest break provision in 49 CFR 395.3(a)(3)(ii) and the restriction of the RODS exception for short-haul operations available to drivers who return to their normal work-reporting location within 12 hours [49 CFR 395.1(e)(1)(ii)(A)].

NAPA requested the first exemption from the HOS rest break provision to allow drivers engaged in the transportation of asphalt and related materials to use 30 minutes or more of on-duty “waiting time” to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break. According to NAPA, asphalt is a highly perishable product. It is loaded into the delivery truck at 280-300 degrees Fahrenheit and begins to cool immediately. If the asphalt is not delivered and placed on the paving site within two hours, the product hardens and is no longer viscous enough to be useable. Drivers of asphalt delivery vehicles typically drive approximately one-third of their workday; the rest of their day is spent waiting to load or unload their

vehicles and in other non-driving duties such as paperwork and cleaning their trucks after each load.

NAPA requested the second exemption to allow some drivers to use the short-haul RODS exception but with a 14-hour duty period instead of 12 hours. NAPA advises that while some short-haul drivers will be able to take advantage of the exception from the 30-minute break, other drivers are often required to be on duty more than 12 hours in a day and therefore are not eligible to use the short-haul exception.

NAPA mentioned that drivers of ready-mixed concrete delivery vehicles were granted an exemption from the minimum 30-minute rest break provision.¹ NAPA states that “the same reasoning supporting the exemptions from the 30-minute break time rule and allowing a 14-hour daily on duty-period for drivers of ready-mixed concrete vehicles applies to drivers engaged in the transportation of asphalt and related materials and equipment. Both are perishable products that are not useable if they are not dropped and spread within a brief delivery window. Because of this short delivery window, the routes from the production facility to the delivery site for both products are limited to less than 40 miles, and the time spent actually driving a CMV is typically only a few hours per day. Thus in both cases, the drivers do not face the same fatigue factors as drivers of long-haul trucks, and therefore do not pose the same risk of a fatigue-related accident as long-haul drivers.”

¹ More precisely, section 5521 of the Fixing America’s Surface Transportation (FAST) Act, exempts a “driver of a ready mixed concrete delivery vehicle” from the reporting, recordkeeping, or documentation requirements under the hours-of-service regulations if the driver operates within a 100 air-mile radius of his/her normal work reporting location, returns to the work reporting location and is released within 14 hours, and meets certain other requirements [Pub. L. 114-94, 129 Stat. 1312, 1559, Dec. 4, 2015, codified at 49 U.S.C. 31502(f)]. In addition, FMCSA granted drivers of ready mixed concrete trucks an exemption from the 30-minute break requirement [80 FR 17819, April 2, 2015], which section 5206(b)(1)(A) of the FAST Act required to be made permanent [129 Stat. 1312, 1537].

NAPA requested that the operation of certain vehicles and equipment (Water Truck, Tack (tar) Distributor, Equipment Hauler and Pick-Sweeper (Street Sweeper)) be included in the definition of “transportation of asphalt and related materials and equipment” for purposes of these exemptions.

NAPA stated in its application that drivers would remain subject to the HOS regulations and would receive sufficient rest due to the nature of their operations that limit driving to an average of six to seven hours per day or less during the paving season. NAPA believes that granting these exemptions would achieve the same level of safety provided by the two HOS rules. The requested exemptions are for 5 years with renewals. A copy of NAPA’s application for exemptions is available for review in the docket for this notice.

V. Public Comments

On September 7, 2017, FMCSA published notice of this application and requested public comment (82 FR 42415). The Agency received 70 comments representing individuals and various transportation interests in response to the proposed exemptions. The majority of the respondents in support of the requested exemptions were companies, associations, and individuals affiliated with the asphalt industry.

For example, Nu Rock Asphalt Coatings supported the exemptions and stated, “[i]t seems it would be advantageous for those involved in asphalt work to have HOS regulations in line with those found in the ready-mix concrete business. We feel this could be done without compromising safety.”

Wiregrass Construction wrote, “[s]ince the ready-mix industry parallels the asphalt industry in terms of operational limitations with highly perishable, nonhazardous product, it seems perfectly logical that the asphalt industry should be subject to the same

exemption from the 30 minute break requirement and 12 hour limit on Short Haul Exception.”

NAPA was among the many respondents commenting about its application and wrote to specifically clarify the record and provide additional comment concerning its application. NAPA explained that their petition for relief from the specific HOS requirements were not restricted to NAPA members and also provided additional rationale to support the need for both exemptions.

Four respondents made comments about the regulations but took no position on the application. One individual, Mr. Richard Elliott, wrote, “ I do not oppose them using wait time in line as the 30 minute rest period but I do oppose extending any duty hours or exceptions.”

An anonymous respondent and the Advocates for Highway and Auto Safety (Advocates) opposed the requested exemptions. Advocates provided several reasons for not granting the exemptions. According to Advocates, “the Application seeks to exempt an untold number of motor carriers and drivers from safety regulations and provides no justification for the exemptions requested.”

VI. FMCSA Decision

FMCSA has evaluated NAPA’s application and the public comments and decided to grant the exemptions. The Agency believes that all drivers transporting asphalt and related materials and equipment will likely achieve a level of safety that is equivalent to or greater than, the level of safety achieved without the exemption [49 CFR 381.305(a)].

The first exemption from the HOS 30-minute break provision will allow drivers engaged in the transportation of asphalt and related materials to use 30 minutes or more of on-duty “waiting time” to satisfy the requirement for the 30-minute rest break,

provided they do not perform any other work during the break. The second exemption will allow drivers to use the short-haul RODS exception but with a 14-hour duty period instead of 12 hours.

VII. Terms and Conditions for the Exemption

- Drivers must have a copy of this notice or equivalent signed FMCSA exemption document in their possession while operating under the terms of the exemptions. The exemption document must be presented to law enforcement officials upon request.
- Drivers must return to the work reporting location and be released from work within 14 consecutive hours.

Preemption

In accordance with 49 U.S.C. 31315(d), during the period these exemptions are in effect, no State shall enforce any law or regulation that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemptions.

Notification to FMCSA

Exempt motor carriers must notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5), involving any of its CMVs operating under the terms of the exemptions. The notification must include the following information:

- (a) Name of the exemption: "NAPA"
- (b) Name of the operating motor carrier,
- (c) Date of the accident,
- (d) City or town, and State, in which the accident occurred, or closest to the accident scene,

- (e) Driver's name and license number,
- (f) Vehicle number and State license number,
- (g) Number of individuals suffering physical injury,
- (h) Number of fatalities,
- (i) The police-reported cause of the accident,
- (j) Whether the driver was cited for violation of any traffic laws, motor carrier safety regulations, and
- (k) The driver's total driving time and total on-duty time period prior to the accident.

Reports filed under this provision shall be e-mailed to MCPSD@DOT.GOV.

Termination

FMCSA does not believe the drivers covered by this exemption will experience any deterioration of their safety record.

Interested parties or organizations possessing information that would otherwise show that any or all of these motor carriers are not achieving the requisite statutory level of safety should immediately notify FMCSA. The Agency will evaluate any information submitted and, if safety is being compromised or if the continuation of the exemptions are inconsistent with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA will immediately take steps to revoke the exemptions of the company or companies and drivers in question.

Issued on: January 19, 2018.

Cathy F. Gautreaux,

Deputy Administrator.

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